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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 592.

WILLIAM H. OSBORN, CHANNING F. MacNEIL, LEWIS C. ADAIR, *et al.*,

Appellants,

vs.

THOS. W. OZLIN, WILLIAM MEADE FLETCHER and LESTER HOOKER, etc., *et al.*,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

BRIEF FOR THE APPELLANTS.

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BRIEF FOR THE APPELLANTS.

Opinion Below.

The opinion of the three-judge statutory District Court (R. 43-65) is reported in 29 Fed. Supp. 71.

Jurisdiction.

This appeal is taken pursuant to Sections 238 and 266 of the Judicial Code as amended (Sections 345 and

380 of Title 28, U. S. Code). The appeal was allowed by order entered November 3, 1939 (R. 92-93). Reference is made to the Statement as to Jurisdiction filed under Rule 12, for a concise statement of the grounds on which the jurisdiction of this Court is invoked. This Court noted probable jurisdiction on January 8, 1940.

Statutes Involved.

The statutes involved are amendments of Subsection (a) of Section 4222 and Section 4226-a of the Code of Virginia, being parts of Chapter 218 of the Acts of the General Assembly of Virginia of the Session of 1938, effective June 21, 1938 (Acts of 1938, p. 343). For violation of the provisions of these statutes, fines and penalties are imposed by Sections 4180, 4223 and 4235 of the Code of Virginia. The pertinent provisions of the statutes will be found in the Appendix.

Section 4222(a) forbids insurance companies authorized to do business in Virginia to make contracts of insurance or surety "on persons or property herein," except through persons who meet the statutory definition (Section 4221-a) of "resident agents" and are licensed as such by Virginia under Section 4235. Section 4222(a) also forbids insurance companies authorized to do business in Virginia to write, issue, or deliver such contracts unless duly countersigned in writing by a resident agent, and forbids a salaried representative of such company to countersign such contracts. Section 4226-a requires that a resident agent countersigning a contract shall receive "the usual and customary" commission allowed thereon, and forbids him to pay or allow any part of the commission to a non-resident broker not licensed by Vir-

ginia as a non-resident broker, and to pay or allow more than 50% of the commission to a non-resident broker where duly licensed as such by Virginia.

A non-resident broker is, by this Section, defined as any non-resident person, firm, or corporation who solicits for compensation, directly or indirectly to be derived therefrom, contracts of insurance or surety on persons or property located in the State. In order to become a "licensed non-resident broker," a non-resident must apply for and receive a license granted only on terms and upon the payment of a tax.

Questions Presented.

The principal questions presented herein are as follows:

1. Does Section 4222(a) of the Code of Virginia violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States and deprive the corporate appellants of property without due process of law by requiring that a contract of insurance or surety upon persons or property within Virginia shall be made through a resident Virginia agent and thus in effect prohibiting the corporate appellants from making such a contract in a State other than Virginia?

2. Does Section 4226-a of the Code of Virginia, taken in conjunction with Section 4222(a), violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States and deprive the corporate appellants of their property without due process of law by requiring that they pay to a resident

Virginia agent usual and customary commissions on a contract of insurance or surety made outside Virginia upon persons or property in Virginia?

3. Does Section 4222(a) of the Code of Virginia violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States and deprive the individual appellants of liberty and property without due process of law and deny them equal protection of the laws by denying to them the right to countersign a contract of insurance or surety covering persons or property in Virginia?

Statement of the case.

1. Parties.

The appellants, plaintiffs below and hereinafter referred to as plaintiffs, are thirty-four corporations and three individuals. The corporate plaintiffs are thirty-four foreign or alien stock companies each doing business in many states and licensed to conduct in Virginia the casualty insurance or surety business, or both. The three individual plaintiffs have their residences in Virginia and also their principal places of business as salaried agents and Richmond branch managers of certain corporate plaintiffs. These individuals were licensed by Virginia as resident agents prior to June 21, 1938, the effective date of the statute in question, and since that time have been licensed as special agents or company representatives (Op. R. 44-45).

The defendants are officials of Virginia, charged with the administration of the insurance laws of that State (Op. R. 45).

2. Proceedings Below.

The complaint herein (R. 1-17) was filed in the District Court of the United States for the Eastern District of Virginia on November 12, 1938, praying for a judgment declaring plaintiffs' rights under Sections 4222(a) and 4226-a of the Virginia Code, as enacted by Chapter 218 of the Acts of 1938, and, on the ground of the unconstitutionality of the statute, praying for interlocutory and permanent injunctions restraining the defendants from enforcing it against the plaintiffs.

By order of the District Court entered December 5, 1938, a three-judge court was convened pursuant to Section 266 of the Judicial Code, as amended (Title 28, U. S. Code § 380). The answer of the defendants (R. 22-41) was filed on December 27, 1938. Proof was made by the stipulation of certain facts (R. 93-105) and by testimony taken by deposition, in accordance with the Court's instructions (R. 41-42). Upon the taking of the depositions, objections to the introduction of evidence were noted, to be ruled upon when the depositions were submitted to the Court. Upon submission of the case, briefs and requests for findings were filed.

On September 6, 1939, the Court filed its opinion setting forth therein its findings of fact and its conclusions of law to the effect that the statute in question was not unconstitutional and directing that the prayers for interlocutory and permanent injunctions should be denied and the bill of complaint dismissed (R. 43-65). On October 2, 1939, the plaintiffs filed a motion for a new trial, for the amendment of the opinion and findings and conclusions, and for the making of additional

findings and conclusions (R. 66-79). This motion was denied (R. 79), and on October 6, 1939, a decree was entered denying the relief prayed for by the plaintiffs and dismissing the bill of complaint (R. 79-80). The plaintiffs' notice of appeal (R. 80-81), petition for appeal (R. 81-82), and assignment of errors (R. 82-92) were filed in the District Court on November 3, 1939, and on the same day an order was entered and filed allowing this appeal from the decree dismissing the plaintiffs' bill of complaint.

3. The Facts.

A. The Purpose of the Statute.

The Court below stated that one purpose of the statute is to increase the income of the Virginia resident agents, but that the important object is to compel all contracts covering Virginia risks to be placed by a Virginia resident agent (Op. R. 60-61).

The statute was drawn by the Virginia Association of Insurance Agents, Inc. (R. 348-349, 349-350) which caused it to be introduced in the Legislature in order to "save for Virginia local agents commissions justly theirs" (R. 347, 673). Members of the Association represented to the Legislature that the statute would not affect insurance costs (R. 348, 673, 675), but would bring annually to Virginia agents many thousands of dollars (R. 347, 674-675). The defendants accepted the views of the members of the Association and supported the bill "to get them what they wanted" (R. 557).

B. The Producer of the Contracts.

Contracts of casualty insurance and surety are produced by persons known as "producers" who solicit

the public. The producer is either an agent or a broker licensed by the State in which he acts. He represents the assured in negotiating with the company for the issue of a contract; if he is an agent he may also represent the company in making the contract. The producer must have a sound technical knowledge upon questions of exposure and coverage; he must have the confidence of the assured, particularly when the assured must disclose confidential information concerning his business. The assured is the client of the producer whose success depends upon his salesmanship and his reputation and experience as an insurance man (Op. R. 45). The producer is the sole medium for dealing with the company and the assured as to matters relating to the nature and scope of the coverage (R. 794-798, 833-835, 872). The producer usually controls the selection of the company with which the contract shall be made and may place it in a company not affected by the statute; *e. g.*, a mutual company (R. 121-123, 152-155, 792-793, 859-860, 909).

The production process is the same when the contract is produced in one State to cover risks in another as when it covers in the State of production. Richmond agents produce insurance to cover risks in other parts of Virginia and in other States and nonresident agents and brokers produce contracts to cover exposures in all parts of the country (Op. R. 46).

Practically all contracts produced outside Virginia and insuring persons or property therein, are multiple-coverage contracts covering numerous exposures of the same type located in other states as well as in Virginia (Op. R. 49). Producers in New York and other

large business centers are especially expert in the writing of this business (Op. R. 51). In New York, brokers produce virtually all the contracts, for the demand for insurance is so concentrated and has assumed such tremendous proportions that insurance is bought rather than sold. The broker represents only the buyer. He remains free of company affiliation in order to use the assured's concentrated bargaining power to its best advantage when dealing with the various companies (Op. R. 46).

C. *The Making and Issuance of Contracts Produced Outside Virginia.*

After the non-resident producer and the assured have considered the exposures and determined upon the desired coverage, the company passes upon the acceptability of the risk. The contract form is then prepared in a branch office or agency of the company in the State of production, particular provisions of it frequently being devised by the producer (R. 868). The contract, bearing the printed signatures of the company officers, provides that it is not binding on the company unless countersigned by an authorized representative (Ex. 4, R. 178, 180; Ex. 5, R. 178, 192; Ex. 7, R. 178, 199; Ex. C, R. 494, 496; Ex. D, R. 494, 502). If a non-resident producer is an agent he executes the contract by countersigning it as the company representative; if the producer is a broker, it is thus executed by such a representative. In either case the producer checks the provisions of the contract. After the contract has been thus executed it has been customary for a "law rider", or an endorsement, stating the amount of the premium paid for the Virginia cov-

erage, to be countersigned by a Virginia agent. Prior to the 1938 amendments of the Virginia statutes, such countersignature of the law rider or endorsement has been furnished, without charge, by a salaried resident agent, such as one of the individual plaintiffs. After countersignature, if the contract be a Workmen's Compensation or automobile contract, the law rider or a schedule of the Virginia coverage is filed by the company with the Virginia Insurance Department (R. 125, 159-160, 575-576).

D. *The Acts and Obligations of the Company under the Contracts.*

Under these contracts there is always a contingent obligation to pay money, which payment may be made outside of Virginia and presumably is to be made outside Virginia in cases of non-resident assureds. Under some of the contracts there is a right reserved to the company to perform other acts in Virginia at its option and under other contracts there is an obligation so to do. For example, neither the fidelity bond nor accident and health policy imposes any obligation on the company other than the payment of money (Ex. 4, R. 178, 179-184; Ex. 7, R. 178, 197-200). Such contracts can be fully performed outside the State of Virginia. The glass policy permits, but does not require, the company to inspect the premises in Virginia and in the event of loss to replace the glass in lieu of payment (Ex. 5, R. 178, 185-190). The Workmen's Compensation, automobile and boiler and machinery contracts all require defense of suits or other acts in Virginia (Ex. C, R. 494, 495-501; Ex. 6, R. 178, 191-196; Ex. D, R. 494, 502-505). [The contract

forms referred to are typical of those in general use (R. 178, 201, 574, 577)].

The companies maintain a field force of trained personnel who inspect the exposures in Virginia under certain types of contracts and make recommendations to reduce the possibility of loss and the cost of the insurance to the assured (Op. R. 46, 707-732). This service is rendered in connection with Workmen's Compensation, boiler, elevator, machinery, fleet automobile and some public liability, burglary, plate glass contracts (R. 887). The companies also furnish the assured claim service in Virginia (R. 681-698). The Virginia resident agents render no services to the assured under a policy produced by a non-resident agent or broker, as the non-resident producer renders all services not rendered by the salaried personnel of the company (Op. R. 54).

As to some contracts the probability is that no act will be performed by the company in Virginia or elsewhere, the duration being so short and accidents so infrequent (Ex. 39, 40, R. 895, 896, 898, 899).

E. The Assureds under the Contracts Produced Outside of Virginia.

Occasionally the non-resident assured is an individual who keeps his records and manages his business outside the State and has interests in Virginia and elsewhere. But ordinarily the assured is a large national corporation with its principal office in a large business center (Op. R. 48). Frequently it has personnel at its principal office whose sole function is to

deal with its insurance matters, who purchase all of its coverage there because the cost is decreased by buying in quantity and the solution of its insurance problems is greatly facilitated by centralization of its buying. It is easier to insure against many risks by the procurement of one contract and the payment of one premium therefor and the assured is better able to place the responsibility for proper coverage of its risks in its insurance manager. Such a corporation does not have in the localities of its exposures representatives qualified to attend to its insurance matters, or the records necessary for transacting the business. Multiple coverage contracts are usually rated on the accident and loss record for the combined risks and such rating cannot be determined properly if each exposure must be insured separately through a local agent (Op. R. 49-50).

Ordinarily the central office of such a corporation is located in New York, Chicago or some other large business center (Op. R. 48). Many corporations having their principal office in Virginia similarly purchase their contracts in Virginia to cover exposures in whatever states they may be located (Op. R. 46, 465-466, 481, 483).

F. *The "Usual and Customary" Commission.*

The entire "production cost", or cost of getting the business, is divided into two factors: the "acquisition cost" and the "field supervision cost". The acquisition cost is the commission paid to the producer of the business and averages 13.5% of the premium. This is usually the only compensation he receives.

The field supervision cost, averaging 6.5% of the premium, is the amount paid the general agent for field supervision or retained by the company for branch office maintenance. When a general agent produces a contract, he is given the entire production cost (Op. R. 47-48, 135-137). The company pays a producer's commission on every contract issued (Op. R. 47), the amount of which is determined in the construction of the premium rate as a percentage of the premium (Op. R. 50, 135-137, 225). The defendants construe the term "usual and customary" commission as meaning the producer's commission (R. 100).

G. *Effect of the Statute upon the Plaintiffs.*

A substantial percentage of the contracts covering persons or property in Virginia is produced outside of Virginia. From 10% to 20% of the total premiums for Virginia coverage is paid on contracts produced outside of Virginia, *i. e.*, negotiated, ordered, underwritten, prepared, checked, executed, issued and delivered outside of Virginia. During 1937, twelve of the corporate plaintiffs received premiums of $410,967.62 on Virginia coverage under contracts produced outside the State, and paid commissions of $70,860.96 to non-residents for the production thereof (Op. R. 48). The average premium of one corporate plaintiff for the Virginia coverage under contracts produced outside Virginia in the year 1937-38 is, by computation, about $320 (R. 8-10, 93, 104, 201). Accordingly, the average usual and customary commission to a Virginia resident agent for countersigning such a contract under the challenged statute would be about $43.20.

Under Section 4222, as construed and enforced by defendants, contracts produced outside of Virginia are made through resident agents when countersigned by resident agents even though they do not negotiate the contracts or deliver the same or collect the premiums (Answer, 16-a, R. 32); and a resident agent may delegate the privilege of countersignature to an office employee by power of attorney (R. 567). The latter ruling did not restrict the delegation to an employee qualified to supervise the contents or form of the contract.

Under the statute, a Virginia agent must be paid the usual and customary commission for countersigning a contract produced outside Virignia if the non-resident producer is not licensed in Virginia and at least one-half the commission if the producer is licensed as a non-resident broker by Virginia. As bearing on the reasonableness of this requirement the defendants offered and the Court received over plaintiffs' objection, evidence of certain customs in the fire business with reference to the division of commissions in the fire business (Op. R. 56).

Plaintiffs contend that the situation in the fire insurance business differs so materially from the situation in the casualty and surety business as to render such evidence irrelevant on the issue of the reasonableness of the statute in its application to the casualty and surety business. The fire agent is usually an agent for many companies and the sole agent of each of his companies in a given territory (R. 265-266, 356, 627). Customarily local boards are organized which protect these rights of the fire agents. The casualty or surety agent usually has a maximum commission agency con-

tract only with a single company and has no exclusive territorial rights (R. 216-217, 280, 327, 468-469). Frequently the company and the producer of a fire contract procures the assistance of the agent or broker in the locality of the risk in the writing of the contract (R. 329, 356-357, 390); neither the producer of a casualty or surety contract nor the company issuing the contract ever procures assistance in the writing of the contract from an agent or broker in the locality of the risk (R. 111, 209).

The defendants claim that in return for at least one-half the usual and customary commission, the Virginia agent who countersigns a casualty or surety contract will render certain services to the company and the assured. In this regard the trial court, forecasting the future, expressed the opinion that the Virginia agent will doubtless be called upon to render such service as he is qualified to perform, and that the Virginia agent could be of assistance in the servicing of the contract, the adjusting of claims, and generally acting as mediator between the assured and the insurer in Virginia (Op. R. 56). On this the Court also made the following findings:

> "We do not overlook the peculiar situation of the non-resident assured who form no part of the Virginia public which the state desires to protect. Undoubtedly their business methods will be disturbed by the enforcement of the statute. It is contended, not without merit, that they have no need for the services of the resident commission agents, and that in fact, the latter cannot assume the function of producing agents in their behalf without harmfully intruding themselves into confidential

> business affairs. Moreover, it is fair to say that these affairs are so important and so widespread in their scope as to be beyond the technical knowledge and skill of the average Virginia agent, and that the interests of the non-resident assureds can be best looked after by the brokers at the great centers of population where the head offices of the insurance companies and of the assureds are located, and in Virginia by the engineering and claim personnel of the companies. It is also true that the substantial compensation required by the statute to be paid to the Virginia agents will increase the cost of the business" (Op. R. 62).

The non-resident producer will not render the same services to the assured for one-half the compensation he is now receiving (Op. R. 54). He will continue to demand and receive from the company the "usual and customary commission" which has been earned by him as the producer of the business (R. 796, 805, 862-864, 910-911). The statute will, therefore, compel payment of double commissions and thereby increase the cost of insurance on Virginia risks (Op. R. 62).

Up to the present time the Virginia agent has rendered no service in connection with the making or performance of the contract produced outside the State, his act of counter-signing the law rider or endorsement being perfunctory (Op. R. 53-55). Neither the companies nor the assureds have any desire or need for the services of a Virginia agent in the production or servicing of such a contract (Op. R. 56).

The statute imposes no obligation upon the Virginia agent to render any service whatever to the company or to the assured in return for the commission required to be paid him except the manual act of countersignature.

Specification of Errors.

Appellants urge each of the assigned errors* Numbers I to V inclusive (R. 83-92). Without waiving or limiting any of said assignments, more particularly the trial court erred:

1. In finding, concluding and decreeing that Virginia has power to prohibit or regulate the making outside Virginia of contracts of casualty or surety covering persons or property therein and in failing to find that the making of such contracts is beyond the regulatory power of Virginia (Assignments of Error I 2, 3; II 9, 14, 18, 19; IV 31, 32 and 33; R. 83, 85, 86, 87, 90, 91; see Point I *infra*).

2. In finding, concluding and decreeing that Virginia has power to prohibit the production and making of contracts outside Virginia by agents duly licensed by the State where such contracts are made unless such agents are licensed as non-resident brokers by Virginia, and in failing to find that the statute requiring a non-resident agent of the corporate plaintiffs to be licensed by Virginia is beyond the power of the State (Assignments of Error IV 34; R. 91; see Point II *infra*).

*Assignments of Error Nos. I 1-3, inclusive, relate to errors in rulings on evidence. Many of the other assignments relate to findings and conclusions which are deemed plainly speculative, immaterial or inapplicable. These have been assigned and are reserved to avoid any technical question should any of them be claimed to amount to material findings or conclusions by implication

3. In finding, concluding and decreeing that the Virginia statute requiring payment of the usual and customary commission to a Virginia resident agent for countersigning a contract produced outside Virginia and prohibiting the countersigning of such contract by a Virginia salaried representative of the corporate plaintiffs is not discriminatory, arbitrary or an unreasonable exercise of the police and legislative powers of Virginia and therefore not a violation of the Fourteenth Amendment to the Constitution of the United States (Assignments of Error I 1; II 4, 27; IV 35; R. 83, 84, 89, 91; see Point III *infra*).

4. In finding, concluding and decreeing that the Virginia statute prohibiting a state agent, special agent, company representative or other salaried officer or manager of an insurance company from countersigning casualty and surety contracts does not deprive the plaintiffs of their property without due process of law and does not deny the individual plaintiffs the equal protection of the laws and therefore is not a violation of the Fourteenth Amendment to the Constitution of the United States (Assignments of Error II 27; IV 34; R. 89, 91; see Point IV *infra*).

5. In entering its final decree dismissing the bill of complaint and in failing to find, conclude and decree that the plaintiffs were entitled to the relief prayed for in said bill (Assignments of Error V; R. 92; see Point V *infra*).

Summary of Argument.

POINT I The Virginia Statute Prohibiting the Corporate Plaintiffs from Making, Outside of Virginia, Contracts of Insurance and Surety Covering Persons and Property in Virginia, is Unconstitutional and Void.

POINT II Section 4226 (a) of the Code of Virginia, Prohibiting Plaintiffs from Making any Contract of Insurance or Surety on Persons or Property in Virginia if Solicited or Negotiated out of Virginia by a Person not Licensed by Virginia, Denies to the Plaintiffs Due Process of Law, and is Unconstitutional and Void.

POINT III The Requirement that a Countersigning Resident Agent shall be paid the Same Usual and Customary Commission as that paid to Another for Producing the Contract Deprives the Corporate Plaintiffs of their Property without Due Process of Law, and is therefore Unconstitutional and Void.

POINT IV The Prohibition of Section 4222 (a) against Salaried Agents Countersigning Deprives the Corporate Plaintiffs of their Property and the Individual Plaintiffs of their Liberty and Property without Due Process of Law and Denies the Individual Plaintiffs the Equal Protection of the Laws and is therefore Unconstitutional and Void.

POINT V Conclusion.

ARGUMENT.

POINT I.

The Virginia Statute Prohibiting the Corporate Plaintiffs from Making, Outside of Virginia, Contracts of Insurance and Surety Covering Persons and Property in Virginia, Is Unconstitutional and Void.

The question presented to the Court by this case is neither new nor novel. In at least five cases heretofore decided by it, this Court has been squarely presented with the same question, *i. e.*, whether a state may constitutionally regulate or penalize the making, beyond its borders, of contracts of insurance or surety upon persons or property located within the state.

Hartford Accident & Indemnity Company v. Delta & Pine Land Company, 292 U. S. 143;

Fidelity & Deposit Company v. Tafoya, 270 U. S. 426;

Aetna Life Insurance Company v. Dunken, 266 U. S. 389;

St. Louis Cotton Compress Company v. Arkansas, 260 U. S. 346;

Allgeyer v. Louisiana, 165 U. S. 578.

In each of these cases, this Court has denied, as here we believe it must again deny, that a State possesses such power.

In other cases presenting cognate, if not identical, questions this Court has adhered to the position taken in the above cases, and has held that the Fourteenth Amendment prohibits a State from giving such extra-

territorial effect to its statutes as to allow it to regulate or penalize the formation of contracts beyond its boundaries, though having to do with persons or property within them.

Boseman v. Connecticut General Life Insurance Company, 301 U. S. 196;

Home Insurance Company v. Dick, 281 U. S. 397;

New York Life Insurance Company v. Head, 234 U. S. 149.

Here, the corporate plaintiffs are foreign corporations, qualified to do, and doing, insurance and surety business in the State of Virginia. They also do business in other states. In those states, as in Virginia, they make contracts of insurance or surety, or both. Some of those contracts of insurance and surety, made in and according to the laws of those several states, cover risks on persons and property in Virginia. Virginia seeks to prohibit the plaintiffs from engaging in such business in other states, and its statutes attempt to impose upon the plaintiffs penalties for making such contracts. Under the decisions of this Court, it is apparent that the Constitution denies such power to Virginia.

In the group of cases first above referred to, every factor here involved was present. In the *Delta & Pine Land Company* (292 U. S. 143) and *Dunken* (266 U. S. 389) cases, Mississippi and Texas respectively, by their statutes declared that insurance and surety contracts on persons and property within the state should be regarded as local contracts, and required that certain provisions be incorporated in such contracts, in the one

case fixing a statutory period for notice of loss and in the other imposing a penalty for failure to pay promptly. In each case the insurance company was qualified to do business in the state where the risk was located. In each case the contract involved was written in Tennessee. The first was a contract of surety covering an employee in Mississippi, the second a life insurance policy covering a Texas assured. In each case the contract, made in Tennessee and in accordance with its laws, contained terms conflicting with the Mississippi and Texas statutes. In both cases this Court held that the state of residence of the person covered was without constitutional power to regulate or penalize contracts made in Tennessee and there valid, and held the Mississippi and Texas statutes unconstitutional as there applied.

So in the *St. Louis Cotton Compress* case (260 U. S. 346) where Arkansas had attempted to impose upon a foreign corporation qualified to do business in Arkansas, a penalty for making, in Missouri, where rates were lower, a contract of insurance covering Arkansas property, the Court held the statute unconstitutional. The same result was held to be required under the Constitution in the *Tafoya* case (270 U. S. 426), where New Mexico attempted to revoke the license of an insurance company qualified to do business in New Mexico because it had, contrary to the New Mexico statute, made payments to agents out of New Mexico for the procurement of business covering risks arising in New Mexico.

So, too, this Court held unconstitutional the Louisiana statute involved in the *Allgeyer* case (165 U. S.

578) under which Louisiana attempted to impose upon a resident of that state a fine for making, outside of Louisiana with a company not doing business in Louisiana, a contract of insurance covering property within the state and for sending notices to the company with regard to the property covered.

In the remaining cases above referred to (*Boseman v. Connecticut General Life Insurance Company*, 301 U. S. 196; *Home Insurance Co. v. Dick*, 281 U. S. 397; and *New York Life Insurance Company v. Head*, 234 U. S. 149) the situation presented, if not identical with the present one, was closely analogous, and the ultimate issue the same. In every case this Court has held an attempt by a state to regulate or penalize contracts of insurance relating to property or persons within the state but made outside the state, a violation of due process and therefore unconstitutional and void.

Further extended discussion of these cases is, we believe, unnecessary. They may be best summarized by brief excerpts from the opinions in the *St. Louis Cotton Compress* and *Delta & Pine Land Company* cases. In the former, Mr. Justice Holmes briefly stated the position of the Court as follows:

> "It is true that the state may regulate the activities of foreign corporations within the state, but it cannot regulate or interfere with what they do outside" (260 U. S. at p. 349).

In the latter case Mr. Justice Roberts, writing for the Court, briefly set forth in the following sentences the effect of the Fourteenth Amendment upon the Mississippi statute involved:

"The Mississippi statutes, so construed, deprive the appellant of due process of law. A state may limit or prohibit the making of certain contracts within its own territory (Hooper v. California, 155 U. S. 648; Orient Ins. Co. v. Daggs, 172 U. S. 557, 565, 566; New York L. Ins. Co. v. Cravens, 178 U. S. 389, 398, 399); but it cannot extend the effect of its laws beyond its borders so as to destroy or impair the right of citizens of other states to make a contract not operative within its jurisdiction, and lawful where made. (New York L. Ins. Co. v. Head, 234 U. S. 149; Aetna Ins. Co. v. Dunken, 266 U. S. 389, 399). Nor may it in an action based upon such a contract enlarge the obligations of the parties to accord with every local statutory policy solely upon the ground that one of the parties is its own citizen. Home Ins. Co. v. Dick. 281 U. S. 397, 407, 408." (292 U. S. at p. 149).

In the light of these decisions, we believe it apparent that Virginia's attempt to regulate the business of the plaintiffs in other states must be held unconstitutional. Indeed, the congenital defect of the Virginia statute is indicated by its own limitations, for Virginia makes no attempt by her statutes to restrict the making of insurance or surety contracts on persons or property in the state by corporations not qualified to do business there. Obviously, such an attempt, if made, would be predestined for failure. And no more successful, we believe, can be this attempt to use the state's regulatory power over internal affairs as a lever with which to control and restrict transactions beyond her jurisdiction—to inflict upon the plaintiffs, if we may use

the phrase of Mr. Chief Justice White, "a perpetual contractual paralysis following them outside of the jurisdiction of the state". *New York Life Insurance Company v. Head*, 234 U. S. 149, 161; *Fidelity & Deposit Company v. Tafoya*, 270 U. S. 426.

* * * * *

As opposed to the consistent lines of decisions in cases identical or closely analogous to the present one the defendants, and the Court below, have offered in support of the statute contentions falling into three divisions: (1) That the statute reinforces Virginia's control over local business, and assists in making effective whatever regulation of local business her policy may demand; (2) That, under the decision of this Court in *Bothwell v. Buckbee, Mears Co.*, 275 U. S. 274, the fact that the plaintiffs may render services in the State in connection with policies written outside the State renders the Statute constitutional; (3) Decisions of this Court in cases involving the permissible measure of state taxation.

(1) It is argued, by the Court below, in support of the statute that it will assist Virginia in making effective her regulation of local insurance business, and thereby assist her in carrying out policies which she is undoubtedly free to adopt (Op. R. 61). The same argument was advanced in support of each of the statutes declared unconstitutional in the cases we have discussed above.

Undoubtedly it was legitimate local policy for Texas to determine that in contracts of insurance made in that state, no provision should be made for a period

for giving notice of loss or bringing suit shorter than that determined by the legislature (cf. *Boseman v. Connecticut General Life Insurance Company*, 301 U. S. 196 and *Home Insurance Company v. Dick*, 281 U. S. 397) and that payment for loss should be made promptly (cf. *Aetna Life Insurance Co. v. Dunken*, 266 U. S. 389). Clearly Mississippi might regulate provisions for notice of loss contained in contracts made within that state. (cf. *Hartford Accident & Indemnity Company v. Delta & Pine Land Company*, 292 U. S. 143). We know from *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389 that Arkansas might regulate premium rates on contracts made within that state (cf. *St. Louis Cotton Compress Company v. Arkansas*, 260 U. S. 346). It is apparent from *O'Gorman & Young, Inc. v. Hartford Fire Ins. Co.*, 282 U. S. 251, that New Mexico might reasonably regulate commissions paid in that state on contracts made there (cf. *Fidelity & Deposit Company v. Tafoya*, 270 U. S. 426). Obviously, Louisiana possesses regulatory power with regard to contracts of insurance made within her boundaries (cf. *Allgeyer v. Louisiana*, 165 U. S. 578), and Missouri with regard to loans made there (cf. *New York Life Insurance Company v. Head*, 234 U. S. 149).

In every instance referred to, the statute involved embodied a determination of state policy permissible in the regulation of local affairs. In every case it was held unconstitutional when, in pursuance of that policy, it attempted to restrict, regulate, or prohibit the doing of acts, the making of contracts, beyond the state's territorial limits. In this case the statute does precisely that. It attempts to prohibit the production and making of a contract outside Virginia unless a Virginia

agent signs the contract and collect the premiums. In short, under this statute no contract of insurance covering risks in other states and including Virginia risks can be made anywhere except within the State of Virginia (Sec. 4226-a).

Here, the statute itself suggests and the defendants answer frankly admits (R. 40-41) that the Virginia policy embodied in this legislation is an attempt to divert business from other states and into Virginia. But even if it be admitted that this policy is legitimate, or that some other and more admirable one supplies the reason for the statute, it is still clear that Virginia may not, without denying to the plaintiffs due process of law, enforce that policy by penalizing the plaintiffs for acts done and contracts made beyond Virginia's jurisdiction.

(2) Both the Court below and the defendants refer to the decision of this Court in *Bothwell v. Buckbee, Mears Co.*, 275 U. S. 274, in support of the statute here challenged. But the support sought for is patently not furnished by the decision. In that case, an insurance company not authorized to do business in Minnesota sent its representative into that state and there solicited business from a Minnesota resident. This court held that since the company had violated Minnesota law by going into the state and there doing business without authorization, Minnesota was not required to furnish the aid of its courts for a suit upon the resultant contract. This Court in its opinion by Mr. Justice Brandeis drew a clear line between the situation arising in the present case and that presented by the case then at bar when it said:

"The parties had, under the Allgeyer and Cotton Compress Co. cases, the constitutional right to make in Maryland a contract of insurance despite a prohibition of the Minnesota law. But the company, a foreign corporation, had no constitutional right to solicit the insurance in Minnesota by means of an agent present within that state. For the act of solicitation there the state might have punished the agent; and also the company as principal." (275 U. S. p. 277.)

In the *Bothwell* case, this Court, as stated above, held that since the Insurance Company had violated the laws of Minnesota by negotiating the contract in that state though unlicensed to do business there. Minnesota might refuse to lend the aid of its courts in a suit upon the contract. This was true even though, as the Court stated, Minnesota could not constitutionally prohibit the making of the contract outside the state.

The Court then went on to state (275 U. S. pp. 278-279) further reasons why Minnesota need not permit the suit in its Courts. It pointed out that the contract which was one of "strike insurance", required or contemplated that the Insurance Company should do various acts in Minnesota. Since the company was not licensed to do business in Minnesota these acts, required or contemplated there, would be illegal. Therefore, said this Court, the state "may refuse to enforce a contract which provides for doing within it an act prohibited by its laws" (275 U. S. p. 278).

From this holding, the defendants draw the rather unwarranted conclusion that the Virginia statute here

in question must be held to be constitutional. They state that the contracts of insurance or indemnity issued by the plaintiffs in this case call for acts to be done in Virginia ("servicing the contracts"), and from this they argue that Virginia thereby "acquires jurisdiction" over the contracts with the assumption that this "jurisdiction" gives Virginia the power to regulate or prohibit the making of the contracts beyond the state as well as the power to regulate performance within the State. The fallacies of the defendants' argument are apparent.

First: The Virginia statute here in issue prohibits the making of contracts outside the state. It attempts neither to regulate nor to prohibit performance within the state. This Court in the *Bothwell* case specifically stated (See above) that Minnesota could not constitutionally prohibit, as Virginia here attempts to do, the making of the contract outside of Minnesota. The Court, denying Minnesota's power to prohibit the making of the contract, held only that Minnesota need not open its courts to suit on a contract negotiated illegally in Minnesota and requiring and contemplating the performance of illegal acts within the State.

Second: This case does not involve the doing of any prohibited act, either in making or performing contracts, within Virginia. The plaintiffs here seek the protection guaranteed them by the Constitution against penalties sought to be imposed by Virginia for negotiating and making contracts entirely beyond the state's borders. Virginia seeks not to penalize, as Minnesota did, illegal action within the state, but to prohibit action outside the state, which this Court held Minnesota powerless to do.

Nor do the contracts which the plaintiffs assert they have the right to make outside the state require or contemplate that they shall do any illegal act within the state. Virginia has not attempted either to regulate or prohibit the performance of such contracts. Concededly, if Virginia so wished it could impose reasonable regulation of performance of any contract within that state. But it has not done so and this case does not involve any such regulation. The plaintiffs are licensed to do business in Virginia, and no act of performing or servicing a contract of insurance therein is prohibited to them by any Virginia statute. The defendants argue a case not here at bar when they argue that Virginia could regulate the performance or servicing, within the state, of contracts made outside. Granted that power, Virginia still lacks the power to prohibit and penalize the making of contracts outside the state (*Bothwell v. Buckbee, Mears Company*, 275 U. S. 274).

Third: While some of the insurance contracts written by the plaintiffs do call for or contemplate service within Virginia—service which no Virginia law prohibits to the plaintiffs—many of them are accident policies and fidelity bonds similar to the contracts considered in the *Boseman* and *Delta & Pine Land* cases, *supra* (Ex. 4, R. 178-184; Ex. 7, R. 178, 197-200). These contracts neither require nor contemplate performance or service in Virginia. Yet the statute makes no distinction between these contracts and others such as Workmen's Compensation policies (Ex. C, R. 494-501) which do call for service within the state. Even if it were not otherwise clear, it must be apparent from this that it is not performance and service within the state which Virginia attempts to regulate and that the

statute is not to be jusified on the asserted basis of its being enacted in assistanee of such regulation.

The *Bothwell* decision lends no support to the defendants. If there were doubt of that, it must be removed by the Court's subsequent decisions in *Home Insurance Company v. Dick, Hartford Accident & Indemnity Company v. Delta & Pine Land Company,* and *Boseman v. Connecticut General Life Insurance Company,* all referred to and discussed above.

(3) The third contention advanced in support of the Virginia statute is based upon decisions of this Court with reference to the permissible measure for the determination of taxes. Particularly emphasized are the decisions of the Court in *Equitable Life Assur. Society v. Pennsylvania,* 238 U. S. 143 and *Compania General de Tabacos v. Collector,* 275 U. S. 75. In those cases the Court held that it was permissible for a state (or territory) to determine the measure for local taxes by including therein premiums on contracts of insurance covering persons or property within the state (or territory) even though the contract were made outside the state (or territory). Again we might point out that the later decisions of the Court above referred to in cases identical or analogous with the present one, demonstrate that these cases offer no support for the Virginia legislation here in issue.

But even putting aside these more recent decisions of the Court on statutes similar to §4222 (a) of the Code of Virginia, it must be apparent that the defendants' argument has little merit. In cases too numerous to mention, this Court has held that a state may, in determining the measure of local taxes, take into consideration relevant factors arising beyond the state, so long as method was reasonable and apportion-

ment not unfair. But the Court has never held that these extra-territorial factors are subject to the regulatory or prohibitory power of the state. If this were true we should be afflicted with constantly recurring conflicts of state laws relating to the same acts.

Perhaps no case better illustrates the difference between the power of a state to take into consideration for tax purposes factors arising beyond its boundaries and the power of the state to extend its regulatory power to extra-territorial acts, than the decision much relied on below, *Great Atlantic & Pacific Tea Co. v. Grosjean*, 301 U. S. 412. It was there held that Louisiana might impose a tax upon chain stores, graduated by number, and in imposing the graduated tax on stores within the state, might take into consideration the number of stores owned by the taxpayer outside the state. But this decision certainly did not mean that Louisiana could regulate the conduct or operation of the stores beyond its boundaries. It is, we believe, hardly probable that the Court intended to indicate, or would ever hold, that Louisiana could constitutionally prohibit the Great Atlantic & Pacific Tea Company from selling in its stores in Ohio and Oregon, Maine and Michigan, and all the states in which such stores are located, any sugar other than Louisiana cane sugar, any matches other than those containing Louisiana sulphur, or any salt other than that produced in Louisiana. Yet such a Louisiana statute, improbable as it may be, finds its parallel in Section 4222 (a) of the Code of Virginia. We believe it apparent that Louisiana's permissible exercise of its taxing power affords no sanction or precedent for Virginia's attempt to give to its insurance laws extra-territorial force and operation.

POINT II.

Section 4226(a) of the Code of Virginia Prohibiting Plaintiffs from Making Any Contract of Insurance or Surety on Persons or Property in Virginia if Solicited or Negotiated out of Virginia by a Person not Licensed by Virginia, Denies to the Plaintiffs Due Process of Law, and is Unconstitutional and Void.

As has been seen heretofore, Section 4222 (a), as amended, of the Code of Virginia attempts to prohibit the plaintiffs from making any contract of insurance or surety on persons or property except through resident agents. Section 4226-a defines as non-resident brokers any non-resident person, firm or corporation who shall solicit for compensation, directly or indirectly to be derived therefrom, any contracts of insurance or surety on persons or property located in the state, and prohibits any resident agent from writing or issuing any contract of insurance or surety on persons or property in the state, produced by any "non-resident broker" who is not licensed by Virginia.

It is apparent from these provisions (1) that plaintiffs' agents who are non-residents of Virginia and who are compensated by commissions fall within the statutory definition of non-resident brokers, and (2) that, taken together, these sections of the statute attempt to prohibit the plaintiffs from issuing contracts produced outside the state by the plaintiffs' agents duly authorized and appointed in the state where licensed unless such agent be also licensed by Virginia after the payment of a tax.

In thus regulating and prescribing the persons whom the plaintiffs may select and appoint to represent them in other states, and in prohibiting the plaintiffs from making contracts of insurance or surety produced by their agents in other states unless such agents shall have been licensed by Virginia, that state is giving to its laws extra-territorial operation, and is denying to the plaintiffs due process of law.

That this section of the statute is unconstitutional must follow from the decision of this Court in *Fidelity & Deposit Company v. Tafoya*, 270 U. S. 426. In that case the plaintiff insurance company, a foreign corporation licensed to do business in New Mexico, sued to enjoin the members of the State Corporation Commission from suspending its license to do business in the state. The defendants were threatening to do so "for the sole reason that the plaintiff has made payments to its agents in states other than New Mexico in connection with the procurement of business made, written and placed" in New Mexico. A statute of New Mexico made it "unlawful for any insurance company authorized to do business in New Mexico • • • to pay • • • either directly or indirectly, any fee, brokerage, or other emolument of any nature to any person, firm or corporation not a resident of the State of New Mexico, for the obtaining, placing or writing of any policy or policies of insurance covering risks in New Mexico. Any insurance company violating this section shall have its certificates of authority to do business in this state suspended for not less than one year."

The opinion of the Court in that case, written by Mr. Justice Holmes, and holding the statute contrary

to the Fourteenth Amendment, so clearly controls in the present case that we take the liberty of setting it forth at some length:

"Coming then to the merits we assume in favor of the defendants that the state has the power and constitutional right arbitrarily to exclude the plaintiff without other reason than that such is its will. But it has been held a great many times that the most absolute seeming rights are qualified, and in some circumstances become wrong. One of the most frequently recurring instances is when the so-called right is used as part of a scheme to accomplish a forbidden result. Frick v. Pennsylvania, 268 U. S. 473, American Bank & T. Co. v. Federal Reserve Bank, 256 U. S. 350, 358. Badders v. United States, 240 U. S. 391, 394; United States v. Reading Co., 226 U. S. 324, 357. Thus the right to exclude a foreign corporation cannot be used to prevent it from resorting to a federal court, Terral v. Burke Constr. Co., 257 U. S. 529; or to tax it upon property that by established principles the state has no power to tax, Western U. Teleg. Co. v. Kansas, 216 U. S. 1, and other cases in the same volume and later that have followed it; or to interfere with interstate commerce. Sioux Remedy Co. v. Cope, 235 U. S. 197, 203; Looney v. Crane Co., 245 U. S. 178, 188; Western U. Teleg. Co. v. Foster, 247 U. S. 105, 114. A state cannot regulate the conduct of a foreign railroad corporation in another jurisdiction, even though the company has tracks and does business in the state making the attempt. New York, L. E. & W. R. Co. v. Pennsylvania, 153 U. S. 628, 646.

The case last cited was one of an attempt to regulate the corporation's payments in another state. By the same principle on even stronger grounds the corporation cannot be prevented from employing and paying those whom it needs for its business outside the state * * *." (270 U. S., pp. 434-435.)

We believe that this decision of the Court demonstrates that Virginia has no power to regulate the corporate plaintiffs as to those persons whom they employ outside of the state, or to prohibit the corporate plaintiffs from making contracts of insurance produced by agents duly appointed in the states wherein they act, regardless of any license by Virginia.

POINT III.

The Requirement that a Countersigning Resident Agent shall be paid the Same Usual and Customary Commission as that paid to Another for Producing the Contract Deprives the Corporate Plaintiffs of their Property without Due Process of Law, and is therefore Unconstitutional and Void.

Section 4226-a, supplementing Section 4222 (a) which requires that every contract shall be signed by a resident agent, requires that he shall be paid the usual and customary commission paid for the production of the business. The statute imposes no responsibility and no duty upon the resident agent other than the countersigning of the contract. As pointed out below, the Court has found that this provision in operation will require the payment of a commission to the producer and another full commission to the resident agent.

Another pertinent and significant feature of the statute is the provision that if the business has been actually produced by an out-of-state agent or broker who has been licensed by the State of Virginia, the resident agent may, in his discretion, pay to the actual producer an amount not exceeding 50% of the compensation received by him. It follows that if the out-of-state producer has not been licensed by the State of Virginia, the resident agent cannot make any payment to him.

Thus the question of whether the resident agent is to receive the full commissions or only 50% of them is

to be determined not by the amount or value of his services, but by the adventitious and unrelated question of whether the out-of-state producer who brought the business to the company was or was not licensed by the State of Virginia.*

The novel character of this arrangement challenges close scrutiny and suggests that this is not a normal business practice, but a device aimed to accomplish an ulterior purpose.

As above stated, we contend that the statute is unconstitutional because by it Virginia attempts to give extra-territorial effect to her laws. But even without regard to that question, we submit that the provisions of the statute above referred to taken with Section 4222 (a) are so arbitrary as to deprive the corporate plaintiffs of their property without due process of law.

The Court below seemed to infer (Op. R. 51) that this requirement might be brought within the police power, first, because it would tend to increase the revenue of resident agents and of small domestic insurance companies, and second, because it would definitely increase the cost of insurance to all non-resident assureds and thus give aid to their small competitors domesticated in Virginia. The Court also intimated that this provision would operate to lessen the difficulty of enforcing the State Insurance Laws (Op. R. 52-53).

It is important to note that the chief reasons given by the Court in support of its view are based upon

*Some, at least, of the out-of-state producers who bring the business to the companies are not licensed by the State of Virginia. The companies are without power to compel these producers to procure such licenses (R. 93, 104).

matters of speculation and "prognosis". The Court thought it possible to expect that if the resident agent received this commission, he might be encouraged to render himself useful (Op. R. 53-61). These expectations as to the future conduct of a resident agent, as enumerated in the opinion, may be thus summarized:

A resident agent receiving the same usual and customary commission paid to another for producing the business and retaining at least 50% of it "will *doubtless* be called upon to render such services as he may be qualified and able to perform, even though the statute merely provides that the contract shall not be made except through resident agents and except with their countersignature thereon" (Op. R. 56). Such agents "*could* be of assistance in checking the coverage and premium, servicing the contract, adjusting claims of loss, and acting in general as the mediator between the assured and the insurer in the locality of the exposure" (Op. R. 56). The Court (Op. R. 61) thought "it is reasonable to conclude" that the requirement "*will probably* lead to greater participation on the part of the resident agent and he will be expected to render to the company and to the assured all the services of which he is capable. The tendency will be to create a more efficient agency force with the result that the local interests of the insured will be better served", and "it cannot be denied that such an agent can render services of substantial value." Finally the Court observed (Op. R. 61) that it is not an unreasonable "prognosis" that the creation of greater responsibility on the part of the resident agents will assist the state in the enforcement of its insurance laws.

It is respectfully submitted that in the absence of a statutory provision imposing any duties or responsibilities upon the resident agent, this requirement is unconstitutional. There is no relationship between the amount of the required compensation and the value of the services certain to be rendered by the recipient to the corporation which is required to make the payments. Cf. *West Coast Hotel Company v. Parrish*, 300 U. S. 379, 396; *Morehead v. New York*, 298 U. S. 587, dissent by Hughes, C. J. 622-623; *New York Life Ins. Co. v. Dodge*, 246 U. S. 357, dissent of Brandeis, J. 382.

An even clearer demonstration that this requirement is an unnecessary and unjustifiable interference with the business of the corporate plaintiffs, is to be found in the findings of fact of the court below, which appear to overweigh and even refute the prognoses above outlined.

The Court below clearly set forth the financial burden which these provisions will impose upon the corporate plaintiffs and their non-resident assureds. It stated in its findings (Op. R. 54):

> "The Act * * * will substantially affect the production of hotchpotch or master policies outside the state, since in every case at least 50% of the acquisition cost thereof must be paid to a Virginia agent. Thereby the cost of the insurance on Virginia risks will be increased; for if the assured buys directly from a Virginia agent, he will lose the great advantage inherent in the concentration of his buying power; and if he buys from a non-resident broker, he must pay a commission both to the broker and the resident agent. The amounts

now paid the out-of-state producer are not shown to be excessive, and it is not to be expected that he will render the same services for one-half of the compensation."

The Court also found that there were aspects of the business in which no adequate services could be obtained from resident agents. Practically all the contracts produced outside of Virginia are multiple coverage contracts (R. 49). Such contracts are usually rated as to premium on the accident and loss record previously made on all of the combined risks. Such ratings can not be determined properly if each separate risk or exposure must be separately insured through local resident agents (R. 50). In many localities of exposure there are no resident agents capable of handling the insurance of a large corporation (R. 50). The Virginia resident agents do not have the opportunity to acquire the information and experience that will acquaint them with the insurance market and render them expert in the rating and underwriting of multiple risks (R. 51). After the contract goes into effect, the producer customarily ascertains whether the assured is receiving proper attention from the companies' servicing personnel, and he makes his own investigations and recommendations in the light of his own expert knowledge in order to reduce the client's rating and expense (R. 46). The assured does not have in the locality of its various exposures representatives authorized and qualified to attend to its insurance matters nor the records necessary for transacting the business (R. 50). The companies and assureds have felt no desire or need for the services of the local agent in the production and servicing of master contracts (R. 56).

Referring to the 50% (or 100%) tribute—exacted by the statute on behalf of Virginia agents—the Court below subsequently pointed out that this gave no added protection or service to the non-resident assured, saying (Op. R. 62):

> "We do not overlook the peculiar situation of the non-resident assured who form no part of the Virginia public which the state desires to protect. Undoubtedly their business methods will be disturbed by the enforcement of the statute. It is contended, not without merit, that they have no need for the services of the resident commission agents, and that in fact the latter cannot assume the function of producing agents in their behalf without harmfully intruding themselves into confidential business affairs. Moreover, it is fair to say that these affairs are so important and so widespread in their scope as to be beyond the technical knowledge and skill of the average Virginia agent, and that the interests of the non-resident assureds can be best looked after by the brokers at the great centers of population where the head offices of the insurance companies and of the assureds are located, and in Virginia by the engineering and claim personnel of the companies. It is also true that the substantial compensation required by the statute to be paid to the Virginia agents will increase the cost of the business."

The reasons, based upon expectation, given by the Court below for upholding the statute seem clearly inconsistent with the Findings of Fact above recited.

In short, (1) it is the insurance company, not the local agent, who maintains a staff of engineers who

inspect the risks covered by the company (Op. R. 46); (2) it is the producer, not the local agent, who not only ascertains whether the assured is receiving proper attention from the servicing personnel (of the company), but also makes his own investigations and recommendations in order to reduce the client's rating and expense (Op. R. 46); (3) in many localities of exposure there are no resident agents capable of handling a large corporation's insuranee (Op. R. 50); (4) the services habitually offered a resident assured by a resident producer have, in the case of a non-resident assured been rendered, not by the local agent, but by the non-resident producer and by the companies' salaried employees, such as engineers and adjusters, particularly the latter, when the matter has been one that could not be handled by a producer remote from the locality of the coverage (Op. R. 55); (5) the plaintiff companies and the assureds have felt no desire or need for the services of the local agent in the production and servicing of master contracts (Op. R. 56): and (6) prior to the Act of 1938, the resident agent who countersigned a contract produced outside the State performed no useful function in the production, underwriting or servicing of the contract.

In the face of these findings, what are the services for which the company must pay the resident agent the full commissions usually paid to a producer? To entitle him to receive not more than all and not less than half of the usual commissions, the statute requires him to do one, and only one, thing. He must countersign, and he alone is permitted to countersign, the contract.

For the simple task of countersigning—writing his name—he receives the statutory compensation. And the task which he must perform the Court below characterized—and the characterization can hardly be disputed—as perfunctory (Op. R. 55).

The uncontradicted testimony shows that the amount of compensation which the statute requires will be grossly excessive. In the case of one corporate plaintiff, the fees which it will be required to pay to the resident agent for countersigning its policies may be computed as running from $21.60 on certain risks to $43.20 on other risks (R. 8-10, Op. R. 47, 93, 104, 201). The unreasonableness of this arbitrary requirement of usual and customary commission is further illustrated by the absence from the statute of any mandate requiring the countersigning resident agent to accept the usual and customary commission where the amount of this compensation will be slight.

As stated above, the Court erred in assuming that the custom of splitting fire insurance commissions provides an analogy for this statutory requirement. The countersigning fire insurance agent has exclusive territorial rights not possessed by a countersigning casualty or surety agent (R. 216-217, 265-266, 280, 327, 356, 468-469, 627). The countersigning fire insurance agent frequently writes the contract while the countersigning casualty or surety agent never does (R. 111, 209, 329, 356, 390).

We respectfully submit that there can be no justification for such a statute arbitrarily requiring excessive payments to be made in return for the possibility of some services being rendered, highly speculative in

character and wholly undesired. In the Court below, defendants relied on the decision in *O'Gorman & Young, Inc. v. Hartford Fire Insurance Company*, 282 U. S. 251. In that case, this Court upheld a New Jersey statute limiting commissions payable to insurance agents, the opinion pointing out that large commissions increased rates and that the public having a proper interest in those rates, the State might therefore insist that commissions be kept within reasonable limits. It is respectfully suggested that if the reasons for its decision in that case are sound, it does not support, but instead its implications negative, the validity of the present Virginia statute.

Certainly nothing in that decision supports a statute requiring large payments, arbitrary in amount, to be paid by the corporate plaintiffs to agents for problematical services,—particularly where the payments, as the Court below found, will inevitably increase the expenses of the insurance companies and the cost of insurance to the public. The Fourteenth Amendment operates to prohibit the bold expropriation of property by a State. These provisions of the Virginia statute, we respectfully submit, require a decision that it is unconstitutional under the provisions of the Fourteenth Amendment.

POINT IV.

The Prohibition of Section 4222 (a) against Salaried Agents Countersigning Deprives the Corporate Plaintiffs of their Property and the Individual Plaintiffs of their Liberty and Property without Due Process of Law and Denies the Individual Plaintiffs the Equal Protection of the Laws and is therefore Unconstitutional and Void.

The statute is arbitrary and unconstitutional in that it denies to the individual plaintiffs the equal protection of the laws by denying to them the right to execute, by countersigning, contracts covering persons or property therein and produced *within* Virginia. The individual plaintiffs were, prior to June 21, 1938, licensed insurance agents in the State of Virginia and the only reason they are not now so licensed is because they are salaried employees. No question has been raised as to the competency and fitness of these individuals to act as insurance agents and presumably none can be. They are entrusted by their companies with the same duties as General Agents who are licensed as producing agents (Op. R. 47). Under the statute involved, the salaried agents can solicit, underwrite and deliver contracts as well as furnish assistance to Virginia producers (R. 238). The only right possessed by a resident agent prohibited a salaried agent by the statute is the right to perform the purely manual act of countersignature. Simply because they are compensated by salary rather than by commission the statute now denies them the right so to act.

The prohibition against salaried agents executing by countersignature contracts produced in Virginia by Virginia resident agents substantially decreases the value of the services of salaried agents with consequent damage to them and the corporate plaintiffs by whom they are employed. Frequently these salaried agents have executed contracts produced in other parts of Virginia (R. 219-220). Under this statute it will be necessary for the corporate plaintiffs to have such contracts executed by a Virginia resident agent and to compensate him as well as pay a commission to the producing resident agent.

The physical act of executing or countersigning the contract was formerly perfunctory and under this statute will continue to be a perfunctory act. As construed by the Virginia Insurance Department the "privilege of countersignature" may be delegated by a resident agent to any full time employee of his office (R. 567).

In discriminating against these plaintiffs and handicapping them in the pursuit of a gainful occupation without questioning their fitness or ability, the statute deprives the plaintiffs of their liberty without due process of law and denies to them the equal protection of the laws. A similar case came before this Court in *Smith v. Texas*, 233 U. S. 630. In that case the petitioner was regularly employed as freight train engineer. A statute of Texas prohibited any person from acting as conductor of a freight train unless he had been for two years a conductor or brakeman. The petitioner was convicted of a violation of the statute,

and appealed to this Court. The record showed that he was thoroughly acquainted with the duties of a conductor, and competent to perform them. This Court held that Texas could not constitutionally impose restrictions and limitations upon the holding of the position as conductor without reference to the individual's qualification for the position.

In the present case the restriction imposed upon the individual plaintiffs is equally arbitrary. The fact that they are salaried agents can in no way relate to their fitness to countersign policies of insurance, and to perform the other acts required and expected of a resident agent. Their previous license indicates that the State does not question their fitness. Their method of compensation can in no way affect the performance of their duties either with reference to the insured or the insurer. In the absence of any reasonable basis for the discriminatory classification made by the statute and its restrictions imposed upon the plaintiffs, the decisions of this Court require it to be held unconstitutional. (*Smith v. Texas*, 233 U. S. 630; *Louisville Gas & Electric Company v. Coleman*, 277 U. S. 32).

POINT V.

Conclusion.

The decree below dismissing the plaintiffs' bill of complaint should be reversed, with directions that the court below enter a decree granting to the plaintiffs the relief prayed for in their bill of complaint.

Respectfully submitted,

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February, 1940.

Appendix.

CHAP. 218.—An ACT to amend and re-enact Section 4222, as heretofore amended, 4226-a, and 4235, as heretofore amended, of the Code of Virginia relating to insurance; to amend the Code of Virginia by adding thereto a new section numbered 4221-a defining certain terms as used in certain sections of the Code of Virginia and a new section numbered 4235-b, requiring registration of solicitors and a new section numbered 4235-c; and to repeal Section 168 of the Tax Code of Virginia.

Approved March 22, 1938

(Acts 1938, p. 343)

1. Be it enacted by the General Assembly of Virginia, That sections forty-two hundred and twenty-two, as heretofore amended, forty-two hundred and twenty-six-a, and forty-two hundred and thirty-five of the Code of Virginia, as heretofore amended, be amended and re-enacted and that the Code of Virginia be amended by adding thereto three new sections numbered forty-two hundred and twenty-one-a and forty-two hundred and thirty-five-b, and forty-two hundred and thirty-five-c so that said amended sections and new sections shall read as follows:

Section 4222. Insurance companies not to do business in Virginia except through resident agents or agencies; countersignature; exception; discriminations prohibited; agents not to make agreements not expressed in contracts; notice to companies to refrain from making discrimination; exceptions.—(a) Insur-

ance companies, legally authorized to do business in this State, except life, title and ocean marine insurance companies, shall not make contracts of insurance or surety on persons or property herein, except through regularly constituted and registered resident agents or agencies of such companies; no contract of insurance or surety covering persons or property in this State, except contracts of life, title and ocean marine insurance and except temporary binders covering other forms of insurance shall be written, issued or delivered by any such authorized insurance company, or any of its representatives, unless such contract is duly countersigned in writing by a resident agent or agency of such company; provided, however, that the countersignature of an insurance agency shall not be considered valid unless such countersignature be attested to in writing by a regularly constituted and registered resident agent of such company.

No State agent, special agent, company representative, salaried officer, manager or other salaried representative of any legally authorized insurance company, except a mutual insurance company, shall countersign any contract of insurance or surety, or any renewal thereof, covering persons or property in this State, except contracts of life, title and ocean marine insurance; provided that this section shall not apply to railroad companies and other common carriers engaged in interstate commerce.

(b) No life insurance company doing business in this State shall make any discrimination in favor of individuals of the same class or of the same expectation of life, either in the amount of premium charged or in any return of premium, dividends

or other advantages. No policy of life insurance shall be issued or delivered in this State if it shall purport to be issued or to take effect, at an age lower than the actual age of the applicant at the time of the original written application.

(c) No agent, agency or company representative of any insurance company shall make any contract for insurance or surety or agreement as to such contract other than that which is plainly expressed in the contract issued. No insurance company or agent thereof shall pay, or allow or offer to pay, or allow as an inducement to any person to have issued any contract of insurance or surety, any rebate of premium, or any special favor or advantage whatever in the dividends to accrue thereon, or any inducement whatever not specified in the contract.

(d) A person who is authorized by any company to solicit insurance or applications therefor shall in any controversy between the insured or his beneficiary and the company be held to be the agent of the company which issued the insurance solicited or so applied for, anything in the application or policy to the contrary notwithstanding.

(e) If it shall appear to the satisfaction of the State Corporation Commission after due hearing upon notice, that any insurance company is issuing or making contracts that are directly or indirectly in violation of this section, the Commission shall require such company, and its officers and agents, to refrain within twenty days from making any such contract; provided, that nothing in this chapter shall be so construed as to forbid a company transacting industrial

insurance on a weekly payment plan with weekly collections of premiums at the homes of the insured, from returning to policyholders who have made premium payments directly to the company at its home office or district offices, the savings which the company effects through such direct payment, or to forbid a life insurance company from allowing its *bona fide* employees to receive a commission on the premiums paid by them on policies on their own lives.

Section 4226-a. Resident agents or agencies to collect full premiums and receive full commissions; exceptions thereto: non-resident insurance brokers; definition; exchange of business; not to sign blank contracts of insurance or surety; penalty; exceptions.—No resident agent or agency may write, countersign, issue or deliver any contract of insurance or surety upon persons or property in this State unless there shall be collected at the time the contract is written, issued or delivered, or within a reasonable time thereafter, the full premium on such contract, and the resident agent or agency shall be entitled to and shall receive the usual and customary commissions allowed on such contracts, provided that such resident agent or agency may write such contracts at the request only of such other resident agents or agencies, when such agent or agencies are properly licensed to transact the class of business involved in such exchange, and licensed non-resident insurance brokers who may be authorized by law to broker such contracts, and on exchange of business between resident agents or agencies in Virginia and licensed non-resident insurance brokers in other states the resident agent or agency in Virginia may allow or pay to such licensed non-resident insurance brokers, a commission not exceeding

fifty per centum of the resident agent's or agency's commission allowed on such business.

Every non-resident person, firm or corporation who shall solicit for compensation, directly or indirectly to be derived therefrom any contracts of insurance or surety on persons or property located in this State, except contracts of life, title or ocean marine insurance, either on account of any person desiring to effect any contract of insurance or surety, or on account of any insurance company, shall be deemed a non-resident insurance broker.

Such non-resident insurance broker shall pay the sum of one hundred dollars for the privilege of transacting such business; provided, that if, by the existing or future laws of any other state, an insurance agent of this State shall be required to pay for license or otherwise an amount greater or less than the amount required by this State from similar brokers of such other state by the then existing laws of this State, then and in every such case all insurance brokers of such other states shall be required to pay for license an amount equal to the amount of such charges and payments imposed by the laws of such other state upon insurance brokers of this State.

Before the Commission shall issue a license to any such non-resident insurance broker, the applicant shall make affidavit that he will not during the fiscal year place directly or indirectly any contracts of insurance or surety upon persons or property located in this State, except through duly licensed resident agents or agencies, and the Commission may, by such independent investigation as it may deem proper or necessary,

satisfy itself that the applicant for license is trustworthy and has sufficient knowledge of the business of insurance to conduct the same intelligently. The Commission may, for good cause, refuse to license any such non-resident insurance broker, or may, at any time it may come to its knowledge that any such broker has violated any provisions of the insurance laws of this State, revoke or suspend the license of said broker.

The license shall be issued by the State Corporation Commission upon the payment of the tax into the State treasury.

No regularly constituted and registered resident agent or agency for any insurance company shall sign or countersign any blank contract of insurance or surety; nor may such resident agent or agency allow or pay to any agent not regularly commissioned and registered, or to any unlicensed non-resident insurance broker any portion of any commission which he receives or is entitled to receive.

Any resident agent or agency violating any of the provisions of this section, upon conviction thereof, shall be fined not less than ten dollars nor more than five hundred dollars, and his certificate or certificates of registration shall be suspended or revoked.

This section shall not apply to title insurance companies nor to life insurance companies (except the casualty branches of such companies), nor to mutual insurance companies, nor to contracts of ocean marine insurance, nor to railroad companies and other common carriers engaged in interstate commerce.

Section 4235. Insurance companies to file list of agents, agencies, and company representatives; registration of agents; hearings and appeals; fine for soliciting contracts of insurance or surety without registration.—Every insurance company, except fraternal beneficiary associations, orders or societies, doing business in this State shall file annually with the State Corporation Commission, on or before the first day of July, and at such other times as they may be appointed, a list of the agents, resident agents, agencies and company representatives of said company, authorized to solicit insurance or surety for it in the State of Virginia, and each such agent, resident agent, agency or company representative shall be required to secure a certificate of registration from said Commission, for each company proposed to be represented, authorizing said licensee to represent said company for a period ending on the fifteenth day of July of each year. The fee for said registration shall be one dollar ($1.00) per annum for agents, resident agents or company representatives and two dollars ($2.00) per annum for agencies.

The Commission may, for good cause, refuse to register any such agent, resident agent, agency or company representative or may, at any time that it may come to its knowledge that any such licensee has misappropriated any premium entrusted to him, or has failed to apply said premium as directed by the holder or prospective holder of the contract of insurance or surety, or has been guilty of rebating, twisting the contracts of other companies, or misrepresenting the provisions of the contract he is selling or of the contracts of other companies, or has been guilty of fraudulent or dishonest practices, or has violated any

provisions of the insurance laws, or has otherwise demonstrated incompetency to transact business as an insurance agent, revoke or suspend the certificate of registration of said licensee. The commission may summon witnesses against any such licensee accused of wrong-doing and any licensee whose registration is refused may have a hearing before the Commission on any charge brought against him and may introduce evidence in his behalf. If the Commission revokes or suspends the certificate of registration of any licensee or refuses to register any licensee, such licensee may, as a matter of right, appeal to the Supreme Court of Appeals from such final order as the Commission may make, with reference thereto.

The certificate of registration of each agent shall state the date on which it was issued, the name of the agent, the name of the agency with which he is connected, if any, his address and the name of the company represented by him and shall extend only to the individual mentioned in it and not to any clerk or employee of said agent.

The certificate of registration of each agency shall state the date on which it was issued, the name of the agency, its address and the name of the company represented by it.

The certificate of registration of a company representative shall state the date on which it was issued, the name of the representative and his address and the name of the company represented by him.

Before the Commission shall issue a certificate of registration to any individual who has not heretofore

received such a certificate, it shall require the company desiring to appoint such individual as its agent to solicit insurance for it in this State, to certify by an executive officer or managing agent thereof, that such company has duly investigated the character and record of such individual, and satisfied itself that he is trustworthy and intends to act in good faith as an insurance agent; and the Commission may, by such independent investigation as it may deem proper or necessary, satisfy itself that an applicant for registration is trustworthy and has sufficient knowledge of the business of insurance to conduct the same intelligently.

Before the Commission shall issue a certificate of registration to any agency, who has not heretofore received such certificate, it shall require the company desiring to appoint such agency its representative to certify by an executive officer or managing agent, that it has investigated such agency and is satisfied that it is trustworthy.

Before the Commission shall issue a certificate of registration to any company representative who has not heretofore received such certificate, it shall require the company desiring to appoint such person as its representative, to certify by an executive officer that such company has duly investigated the character and record of such person, and is satisfied that he is trustworthy.

Any person soliciting for, or procuring application for, any insurance company authorized to do business in this State without having first procured a certificate of registration as either agent, agency, solicitor or

company representative shall be subject to a fine of not less than ten dollars nor more than one hundred dollars.

This section shall not apply to any mutual fire insurance company conducting business exclusively in this State and on a strictly mutual plan which pays its losses wholly from assessments upon its members and makes no division or distribution of its earnings or profits among its members.

The fees provided for in this section shall be collected by the Commission and shall be paid directly into the treasurer of the Commonwealth, and placed by the State Comptroller to the credit of the fund for the maintenance of the insurance division of the Bureau of Insurance and Banking.

Section 4221-a. Definition of agent, resident agent, agency, solicitor, special agent and/or company representative.—As used in sections forty-two hundred and twenty-two, forty-two hundred and twenty-six-a, forty-two hundred and thirty-five, and forty-two hundred and thirty-five-b, the following words and/or phrases shall have the following meaning:

"Agent" means any individual, who solicits, negotiates or effects in this State, on behalf of any insurance company or other insurer, contracts of insurance or surety.

"Resident agent" or "resident insurance agent" means an individual agent, whose residence and principal place of business are located in this State, who is authorized by and on behalf of an insurer to trans-

act business as an insurance agent and contract in the name of the insurer; provided, that in cities and towns located partly within and partly without this State the requirements of this section as to residence and principal place of business of agents shall be construed as met if such agent shall have his residence or principal place of business in any part of such city or town, and the State in which such city or town is located shall have established, by law or regulation, like requirements as to residence and place of business of such agents; and provided further that this definition shall not apply to life insurance agents.

"Solicitor" or "insurance solicitor" means any individual, whose residence is located in this State, engaged in the solicitation of contracts of insurance or surety for any licensed agent or agency; provided, that in cities and towns located partly within and partly without this State the requirements of this section as to residence shall be construed as met if such solicitor shall have his residence in any part of such city or town, and the State in which such city or town is located shall have established, by law or regulation, like requirements as to residence of such solicitors.

"Agency" or "insurance agency" means any firm or corporation authorized by and on behalf of an insurer to transact an insurance business in the name of such firm or corporation and whose business is conducted and solicited by regularly constituted and registered resident agents or solicitors.

"State agent," "special agent" or "company representative" means any person, who acts in this State for and on behalf of any insurance company or other

insurer, in the solicitation, inspection or servicing of risks assumed or to be assumed by said company; provided this definition shall not apply to life insurance companies, except the casualty branches of such companies.

Section 4235-b. Agents and agencies to file list of solicitors; registration of solicitors; hearings and appeals.—Every insurance agent and every insurance agency doing business in this State shall file annually with the State Corporation Commission on or before the first day of July, and at such other times as they may be appointed, a list of the solicitors of said agent or agency, if any, authorized to solicit contracts of insurance or surety for it in the State of Virginia and each such solicitor shall be required to secure a certificate of registration from said Commission for each company represented by said agent or agency for which he is to solicit contracts of insurance or surety authorizing him to represent said agent or agency for a period ending on the fifteenth day of July of each year.

The fee for said registration shall be one dollar ($1.00) per annum. No person shall be granted a certificate of registration as solicitor: (1) to represent more than one agent or agency at the same time, (2) if he resides or has his place of business in the same city, town or community in which the agent or agency employing him is located, unless he devote his full time to the work of said agent or agency, (3) if such person holds a certificate of registration as an agent issued under section forty-two hundred and thirty-five.

The certificate of registration of each solicitor shall state the date upon which it was issued, the name of the solicitor, the name of the agent or agency for which he is to solicit and the name of the company represented by said agency. The Commission may, for good cause, refuse to register such solicitor, or may, at any time that it may come to its knowledge that any solicitor has misappropriated any premium entrusted to him, or has failed to apply said premium as directed by the holder or prospective holder of any contract of insurance or surety, or has been guilty of rebating, twisting the contracts of other companies, or misrepresenting the provisions of the contract he is selling, or of the contracts of other companies, or has been guilty of fraudulent or dishonest practices, or has violated any provisions of the insurance laws, or has otherwise demonstrated incompetency to transact business as an insurance solicitor, revoke or suspend the certificate of registration of said solicitor. The Commission may summon witnesses against any solicitor accused of wrongdoing and any registered solicitor may have a hearing before the Commission on any charge brought against him and may introduce evidence in his behalf; but if the Commission revokes or suspends the certificate of registration of any solicitor, then such solicitor may, as a matter of right, appeal to the Supreme Court of Appeals from such final order as the Commission may make, with reference thereto.

Before the Commission shall issue a certificate of registration to any individual who has not heretofore received such a certificate, it shall require the agent, or, if it be an agency then the agency, by a duly authorized officer or representative thereof, desiring to appoint such individual as its solicitor, to certify that

such agent or agency has duly investigated the character and record of such individual, and is satisfied that he is trustworthy and intends to act in good faith as an insurance solicitor; and the Commission may, by such independent investigation as it may deem proper or necessary, satisfy itself that an applicant for registration is trustworthy and has sufficient knowledge of the business of insurance to conduct the same intelligently.

The fees provided for in this section shall be collected by the Commission and shall be paid directly into the treasury of the Commonwealth, and placed by the State Comptroller to the credit of the fund for the maintenance of the insurance division of the Bureau of Insurance and Banking.

Section 4235-c. Exceptions.—Nothing contained in sections forty-two hundred and twenty-one-a, forty-two hundred and twenty-two, forty-two hundred and twenty-six-a, forty-two hundred and thirty-five and forty-two hundred and thirty-five-b shall be construed as applying to reciprocal or inter-insurance exchanges, their attorneys or representatives, except as provided in section one of an act entitled an act to authorize and regulate the exchange of certain classes of reciprocal and inter-insurance contracts among individuals, partnerships and corporations, empowering corporations generally to make such contracts, regulating process in suits on such contracts, and prescribing certain fees, taxes and licenses, and penalty for violation, approved March twenty, nineteen hundred and eighteen, as last amended by an act approved March twenty-nine, nineteen hundred and thirty-four.

2. Be it further enacted by the General Assembly of Virginia, That section one hundred and sixty-eight of the Tax Code of Virginia be, and the same is hereby, repealed.

"§4180. *Companies insolvent or violating law; hearing thereon; when license suspended or revoked; publication of judgment; appeals.* If the State Corporation Commission of of the opinion from any examination, or from any other evidence or information coming to its knowledge that any domestic, foreign or alien insurance or surety company, doing business in this State, is in an insolvent condition, or that it has failed to comply with the provisions of law applicable to such company, or, if any insurance company, or its officers or agents fails or refuses to submit to any examination provided by the laws of this State or fails or refuses to furnish satisfactory evidence of its financial and business standing, or solvency, or fails or refuses to perform any lawful requirements imposed by the laws of this State, the Commission shall, if such company is a foreign or alien company, and an applicant for a certificate of authority to commence or transact business in this State, or if a domestic company, and an applicant for a certificate of authority to commence or transact business in this State, refuse such license or certificate of authority, as the case may be; and if it be a foreign or alien company already licensed and permitted to do business in this State, or a domestic company already authorized to commence and transact business in this State, the commission shall advise such company of such condition, failures or refusal and give ten

days' notice to the said company to appear before the commission to be heard upon the matters complained of at which time the company shall be afforded an opportunity to introduce evidence and to be heard in reference thereto.

If upon such hearing the commission shall be of the opinion that the matters complained of by the commission are true, it shall revoke or suspend, as may seem to the commission proper under the circumstances of the case the license of the said company to transact business in this State, and shall on final judgment, unless an appeal be taken in sixty days, cause notification thereof to be published in one or more newspapers published in this State.

If any insurance company doing business in Virginia be declared insolvent by any court of any State, or be declared insolvent by the insurance department or commissioner of any other State and thereafter prohibited from doing business in such State, the State Corporation Commission may immediately suspend the license of the company to do business in Virginia, pending a hearing called and held as hereinabove provided.

No new business shall be done by any such company, or its agents, while any such order revoking or suspending its license or certificate of authority to do business in this State shall be in force, nor until its license to do business is restored by the State Corporation Commission.

From the action of the commission refusing, revoking or suspending the license of any company to do

business in this State, there shall be an appeal to the Supreme Court of Appeals of this state as provided in section thirty-seven hundred and thirty-four of this Code. (1906, p. 122, ch. 1, §13; 1920, p. 22; 1936, p. 257.)"

"§4223. *Penalties for violating preceding section; appeal.*

Any company, or officer, or agent of any such company, legally admitted to do business in Virginia, violating any of the provisions of the preceding sections shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars for each offense; and when any such company shall have been found to have so violated said section, upon the first offense, its license to do business in this State shall also, after proceeding in the manner prescribed by section forty-one hundred and eighty, be suspended by the State Corporation Commission for a period of ninety days, subject to the right of appeal by such company as is provided; and the Commissioner of Insurance of this State shall, after final judgment, or unless an appeal be taken in thirty days, be required to cause a notice of such suspension of authority to do business in the State to be published in any paper of general circulation published in the city of Richmond, and after the publication of such notice, it shall be unlawful for any person, agent, firm or corporation or any such insurance company or companies, to procure any new applications for insurance in such company or companies, or to issue any policies therein, pending the reinstatement of such company or companies' authority to do business in this State. And

any company or companies whose license may be so suspended by the State Corporation Commission shall not be again permitted to do business in Virginia until all taxes, costs and penalties, due on said conviction, shall have been paid, together with any expenses that may be due under the provisions of section forty-two hundred and twenty-five, to the Commissioner of Insurance. (1906, p. 122, ch. 2, §35.)"